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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT E. YOUNG,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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QUESTIONS PRESENTED

1. Are there any limits, in a criminal case, to a trial court's discretion to exclude evidence offered by the defendant which is clearly admissible and relevant.

2. Is it a defense to a charge under 26 U.S.C. Section 7206(1) (the "tax perjury" offense) that the alleged omitted income was substantially (97-½ %) reported through a "netting" process in which expenses were netted against income. The trial court instructed the jury to the contrary by stating that a taxpayer had the obligation to report gross receipts to permit the IRS to verify the data on a tax return.

3. The defense contended, at trial, that the defendant's bail bonding business was operated as a sole proprietorship. If this was true the government had no case. In a prior proceeding involving the same time frame the Deputy Chief of the Appellate Section, Department of Justice, Criminal Division, stated in a brief to the Court of Appeals to the Eighth Circuit,

"Appellant Bob Young is the owner of an unincorporated bail bonding business****".

Did the trial court deny Young a fair trial by denying his attempt to elicit that admission from that attorney.



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The taxpayer petitions for a writ of certiorari to review the decision of the Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals entered on October 29, 1986 is officially reported at 804 F.2d 116. A timely petition for rehearing with a suggestion for rehearing en banc was denied by the court below on January 5, 1987.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit on October 29, 1986 serves as the final order or judgment. The

time for filing a Petition of Certiorari will expire on March 6, 1987 because a timely petition for rehearing was filed and not denied until January 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

26 U.S.C. Section 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or ***

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

STATEMENT

Three issues are presented in this Petition for Certiorari. The statement below describes them in the sequence set forth in the questions presented.

I

Are There Any Limits In A Criminal Case To A Trial Court's Discretion To Exclude Evidence Offered By The Defendant Which Is Clearly Admissible And Relevant.

At trial the government sought to reconstruct the income of a corporation, Bob Young Agency & Realty, Inc. and corresponding business expenses in order to establish that the operation of Young's bail bond business was profitable. The defense ob-

jected to the computation on the basis that it was fragmentary inasmuch as the Internal Revenue Service did not deduct all the checks written on the bail bonding bank account when they could not identify the nature of the payment. The government's exhibit was received establishing a significant amount of what the government contended to be taxable income. (tr. 916)

After the government rested its case the defendant attempted to introduce evidence establishing that the bail bond business lost money for a period of time covered by the indictment. An expert witness, one Mark Larson, CPA, who was a former revenue agent, had prepared an exhibit establishing a loss of approximately \$500 from bail bonding. The government objected to the admission of the exhibit on the grounds of relevancy and lack of foundation. (tr. 994) The exhibit was an analysis of the bank statements and checks drawn on the pertinent bank account which had already been introduced into evidence by the government. The Trial Court sustained the government's objection and refused the admission of the exhibit. (tr. 1274) At the time the case went to the jury the government's exhibit establishing a significant amount of income was in evidence and the defendant had no exhibit to counter it.

To make matters worse, in closing argument to the jury counsel for the government ridiculed the defense's contention that the bail bond business was not profitable by belittling the defense's failure to obtain such testimony from an accountant rather than an analysis by counsel for Young. (tr. 1429)

In upholding the Trial Court on this issue the Court of Appeals relied upon the doctrine that it will reverse a district court's decision to exclude evidence only if the district court has abused its discretion. However, the Court of Appeals did not make further inquiry and merely held that it felt that the Trial Court was in a better position than it to weigh the relevance of the document, thereby affirming the lower court's action.

II

Is A Taxpayer Guilty Of An Offense Under 26 U.S.C. 7206(1) For Reporting Gross Receipts And Expenses By A Netting Process.

During the trial of this case the government contended that Young's bail bond income was corporate rather than personal income. No category of income labeled, "Bail bond income" was reported on the corporation's tax return but virtually all of the gross income of the bail bond business was "netted out" into an account entitled, "commissions". The government contended that some \$404,000 of bail bond gross income had been omitted but through the netting process it was established that of some \$395,000 had in fact been reported. (Ex. 63-65; tr. 702, 703) The netting out process was one which was performed by the accountants without any knowledge on the part of the defendant. (tr. 704) Our phrase "netting out" simply means that from gross receipts the expenses of the bail bond business were subtracted and the net amount was included under an account entitled "commissions" on the tax return. This fact was apparently not known to the government prior to trial. On this issue the Trial Court instructed the jury as follows:

"The materiality of the alleged false statements pertaining to gross receipts charged in the indictment is a question for the court to decide. You are instructed that the alleged false statements pertaining to gross receipts charged in the indictment, if proven beyond a reasonable doubt, are material, *in that statement pertaining to the taxpayer's gross receipts are essential for ascertaining or verifying the correctness of the tax declared in an income tax return.*" (Emphasis supplied)

It was the position of the defense that the later part of the instruction which is italicized above was improper and misleading in that it indicated that in a criminal action a taxpayer who nets his gross receipts and expenses could be guilty of

a crime, even though the information reported was true and correct.

III

Did The Trial Court Err In Refusing To Permit The Defense To Elicit An Admission Made By Counsel For The Government.

As part of the intitial investigation the government sought to obtain Young's books and records pertaining to the bail bond business and caused a Grand Jury search warrant to be issued. That warrant was challenged, ultimately resulting in a decision of the Eighth Circuit holding the warrant invalid. *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983).

After the records had been seized by agents of the Internal Revenue Service Young sought their return under Rule 41(e), Federal Rules of Criminal Procedure. That rule provides, in pertinent part:

“A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property seized for the return of the property on the ground that he is entitled to lawful possession of the property which is illegally seized.***”

Bob Young personally sought the return of his records and in the trial court the government challenged whether the records were corporate or personal by stating:

“***A particular problem arose when cooperation of Mr. Young was requested by various means and with regard to the records that the search warrants were obtained for. Mr. Young informed the United States, either directly or through his attorney, that these records of Bob Young Bonding Company were of a personal nature and thus, he would not turn them over to agents of the United States in this case. *Investigation indicated that Mr. Young on many occasions had signed as president of Bob Young Bonding*

Company. He further on occasion held himself out to be an attorney in fact of Bob Young Bonding Company."
(Emphasis supplied)

The trial court in its opinion upholding the search warrant stated:

"Appellant Robert Young operates five separate businesses, one of which is the Bob Young Bonding Company, an unincorporated bail bonding business in Fargo, North Dakota."

Young appealed that case; in its brief before the Eighth Circuit. The government again contended the records were corporate, stating:

"Young's cooperation was requested in producing the records needed; Young refused, informing the United States either directly or through his attorney that the records of the Bob Young Bonding Company were of a personal nature. *However, the investigation indicated that Young on many occasions had signed as president of Bob Young Bonding Company and on occasion professed to be an attorney-in-fact of Bob Young Bonding Company.*"
(Emphasis supplied)

The Court of Appeals reversed the trial court and held that the search warrant should be suppressed and the records returned. The government filed a petition for rehearing and in that petition Robert J. Erickson, Deputy Chief, Appellate Section, Criminal Division, Department of Justice stated: (p. 2)

"***Appellant Young is the owner of an unincorporated bail bonding business (Bob Young Bonding Company)***"

We sought to subpoena Mr. Erickson to introduce that admission. The government moved to quash the subpoena and, based upon Young's counsel's statement that the purpose of the

subpoena was to elicit that admission the trial judge granted the government's motion. (tr. 371, 372) The Court of Appeals found no error contending that the government was merely restating information not in contention in the prior proceeding. As is apparent from the portions of the government's briefs quoted above the government most assuredly did contend that the Bob Young Bonding Company was a corporate entity not only in the trial court but also in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A charge under 26 U.S.C. 7206(1) is essentially for tax perjury. The gist of the crime is the filing of a tax return which a taxpayer does not believe to be true and correct in every material respect. The defendant was Robert Young (hereinafter "Young"). The returns were those for a corporation, Bob Young Agency & Realty, Inc., for the fiscal years ended September 30, 1978, 1979, 1980 and 1981, inclusive.

Young signed these tax returns as the corporation's president.

1.

In an effort to prove motive the government attempted to show that the corporation had omitted gross income from Young's bail bonding business, that the income was substantial, that after an allowance for certain deductions the taxable income would be positive and that the tax liability would be of a substantial amount. The foundation for the evidence was certain documents and records of the corporation together with canceled checks and bank statements.

The defendant attempted to counter this evidence by calling Mark Larson, a CPA and former revenue agent who was prepared to testify that for a period of time contained in the indictment years the bail bond business was not profitable. This too went to motive. *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978). The trial court refused to admit the expert's testimony and exhibits on the basis of relevancy and lack of foundation. (tr. 1274) The Court of Appeals in upholding the trial court's ruling committed, we submit, two serious errors, both of which could seriously effect the administration of justice in this and any other criminal case.

The Court of Appeals upheld the trial court's reversal essentially because of the well known rule that a court will reverse a district court's decision to exclude evidence only if the district court has abused its discretion. (App. p. 7) The Court of Ap-

peals, however, demonstrated that it did not inquire into the relevancy of the offered testimony, although, to even a first year law student, the evidence appears to be not only relevant, but crucial to the defendant's case. Instead the Court of Appeals deferred to the trial court stating that since the trial court permitted extensive argument concerning the admissibility of the evidence the trial court was in a better position to rule on the question.

If this is the standard for the administration of justice in criminal cases we suggest that a defendant in a criminal case simply has no chance for any significant review of evidentiary errors made in the court below. Such a position is contrary to the decisions of many other circuits. The Eighth Circuit decision here is contrary to that expressed by the Ninth Circuit in a recent case also involving a prosecution under 26 U.S.C. Section 7206(1). *United States v. McLaughlin*, 663 F.2d 949 (9th Cir. 1981). In that case the Court of Appeals for the Ninth Circuit did not defer to the trial court's exercise of broad discretion on relevancy and foundational issues when it reversed a trial court's ruling excluding evidence offered by the defense to counter a statement made by a witness for the government. This is precisely the situation that was presented here and creates a potential conflict of the law in tax and, for that matter, all criminal cases in the federal system.

Young's right to a meaningful appeal on this crucial issue was denied by the Court of Appeals when it decided:

- a) The trial judge has wide discretion in ruling on evidentiary matters, and
- b) Since the case was complex and the defendant was given an opportunity to argue for the admissibility of the evidence the trial court was in a better position to determine the issue than the Court of Appeals.

This result simply put, means Young had to review of this issue.

2.

When a taxpayer files a return which is not true in every material respect he can be prosecuted under 26 U.S.C. 7206(1). Young reported 97-½ % of the gross income from the bail bonding business through a netting out process that was caused by an error on the part of his accountants. (Ex. 63-65; tr. 702, 703) This "netted amount" was reported on the corporate return under a different category. (tr. 704) There was no suggestion at trial that the "netting out" method was in any way could be traced backed to the actions of Young and was, in fact, admitted to be the work of the accountants. (tr. 704)

Two of the defendant's witnesses, both certified public accountants, testified that the income of the bonding company had been reported to the Internal Revenue Service by virtue of the netting process.

The trial judge instructed the jury, over the objection of Young's counsel as follows:

"The materiality of the alleged false statements pertaining to gross receipts charged in the indictment is question for the court to decide. You are instructed that the alleged false statements pertaining to gross receipts charged in the indictment, if proven beyond a reasonable doubt, are material, in that statements pertaining to the taxpayer's gross receipts are essential for ascertaining or verifying the correctness of the tax declared in an income tax return."

To explain our position here, and the mischief that flows from the government's position in this case, we must utilize an example. For simplicity assume a taxpayer has but one transaction during the year; he sells a tract of land for \$100,000 which cost him \$40,000 and realized a gain of \$60,000. On his return he reports the gain of \$60,000, omitting the listing of his gross receipts and basis.

Under the court's instructions the netting out described above could subject him to criminal prosecution under Section 7206(1), IRC. The trial court's instructions to the jury that a taxpayer's gross receipts are essential for ascertaining or verifying the correctness of the return is a direct statement, to the jury, that the mere failure to list gross receipts is, in itself, a material misstatement.

If the trial court's instruction is a correct statement of the law the Internal Revenue Service could prosecute literally hundreds of thousands of taxpayers who have otherwise believed their returns to be true and correct, for the netting out process in filing complex tax returns is, in today's world, a very common process. Moreover it violates the fundamental purpose of 26 U.S.C. 7206(1), inasmuch as it is intended to be a perjury statute. In the example described above the taxpayer in reporting \$60,000 of income has not told a lie yet, under the trial court's instructions, he could still be prosecuted for tax perjury.

3.

Our third issue concerns primarily an issue of the application of the Rules of Evidence. A crucial issue at trial was the nature of Young's bail bond business, i.e., was it personal or corporate. In a prior proceeding involving the same time frame Robert Erickson a Deputy Chief of the Appellate Section, Criminal Division, Department of Justice stated in a brief to the Eighth Circuit:

“Appellant Young is the owner of an unincorporated bail bonding business (Bob Young Bonding Co.)***”

Young's counsel sought to subpoena Erickson to elicit the admission. The government moved to quash the subpoena and the trial court granted the government's motion. The trial court gave as its reasons that he did not deem the statement to have “trustworthiness” (tr 371, 372), and that the record did not show whether the bail bond business was incorporated or not was a fact within the knowledge of Erickson.

We emphasize that this is a criminal case; the Federal Rules of Evidence, specifically Rule 801(d)(2) clearly permits the introduction of admissions. The Advisory Committee's notes under Rule 801 states:

“***No guarantee of trustworthiness is required in the case of an admission.***”

Moreover the leading commentator on Evidence, Wigmore, states in Wigmore on Evidence, 4th Edition (1972), Section 1053:

“that the personal knowledge of a person making an admission is immaterial to its receipt in evidence”.

It is clear that the lower courts have recognized that the statements made by an attorney for a defendant are admissible against their clients. See, for example, *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976); *United States v. McKeon*, 738 F.2d 26 (2nd Cir. 1984). The significance of the admission in this case is that it was made by a government attorney. The government has utilized, in many cases, as it did in *Ojala, supra*, and *McKeon, supra*, statements made by counsel for private citizens. Here the government should be subject to the same rules and its statements made by its attorneys should similarly be admissible when offered by the defense.

CONCLUSION

The petition for writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 85-5211

United States of America,
Appellee,

v.

Robert E. Young,
Appellant.

Appeal from the United States
District Court for the
District of North Dakota.

Submitted: February 14, 1986

Filed: October 29, 1986

Before LAY, Chief Judge, and ROSS and WOLLMAN, Circuit
Judges.

WOLLMAN, Circuit Judge.

Robert E. Young was convicted by a jury of filing false corporate income tax returns for the years 1978 through 1981. See 26 U.S.C. § 7206(1) (1982). He argues on appeal that the government's theory of the crime—that Young understated

gross income by omitting from his corporate returns most of the income from his bail bonding company—was foreclosed by an earlier court decision that the bail bonding operation was a personal business and not part of Young's corporation. In addition, Young asserts that he made no material misstatements within the contemplation of section 7206(1) because the bail income actually was reflected on his corporate returns, albeit in the form of net rather than gross income. We affirm.

A grand jury in 1982 began investigating various aspects of Young's business affairs. Pursuant to this investigation, a magistrate issued a search warrant for the office of Young's bail bonding business, and agents executing the warrant seized sixteen boxes of records. Young filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure seeking the return of these records, and he eventually obtained relief when a panel of this court held the warrant invalid as authorizing a general search and as having been issued in the absence of probable cause. *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983). Young argues that those warrant proceedings resulted in a judicial determination that his bonding business was personal rather than corporate and that the doctrine of collateral estoppel precluded relitigation of that issue in the present case, thus foreclosing the government's theory of prosecution.

The doctrine of collateral estoppel prevents litigation of an issue when the identical issue was actually litigated in and necessary to the decision in a prior proceeding concluded by a valid and final judgment. *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983). Young argues that this court decided that his bonding business was personal rather than corporate when, in summarizing the facts in the Rule 41(e) proceeding, it stated, "Appellant Robert Young operates five separate businesses, one of which is the Bob Young Bonding Company, an unincorporated bail bonding business in Fargo, North Dakota." *In re Grand Jury Proceeding*, 716 F.2d at 494. In addition, Young points to the following passage in the same opinion:

Finally, the Government suggests that this case presents no constitutional problem because it did not rummage in a *person's* belongings; rather, the records of a company were searched. Since the Young Bonding Company was not incorporated, the records were really Young's personal records. Moreover, there is neither authority nor reason to support the Government's position that a less exacting standard of constitutionality applies to the search of business records. See *United States v. Roche*, [614 F.2d 6, 7 n.2 (1st Cir. 1980)].

716 F.2d at 499 (emphasis in original).

Given the context in which the former statement was made, it cannot reasonably be contended that the court was making a binding finding of fact. The government in defending its search warrant had no need to contest Young's characterization of the status of his bonding business and offered no evidence on the issue, and the court's adoption of the language in Young's brief in reciting the background to the case was in no way necessary to the decision on probable cause or the specificity of the warrant. The outcome would have been the same absent any reference at all to the corporate or personal status of the bail bonding business.

Similarly, the government's argument in the second passage cited above was that a search warrant directed to business records in general should be subject to a less exacting scrutiny than a search warrant addressed to other types of objects. The distinction relied on was not, as the citation to *Roche* makes clear, between corporate and personal business records. The panel's comment regarding the bail bonding company's unincorporated status again was not essential to the disposition of the case.

Young, however, further argues that the court in considering the validity of the search warrant implicitly and of necessity had to have decided that the bail bonding company was a personal

rather than a corporate business because Rule 41(e) requires that a person making a motion for return of property be “entitled to lawful possession of the property which was illegally seized.” Thus, Young asserts, a motion for the return of corporate records would have had to be brought by the corporation itself. Because he brought his Rule 41(e) motion individually and the court considered the merits of his fourth amendment argument, Young contends, the court must have found that he operated the bail bonding business individually.

Assuming for the purposes of this discussion that Young’s interpretation of the requirements of Rule 41(e) is correct, we see no evidence that the government defended against Young’s motion on that basis. Young’s authority to bring the motion was not so much implicitly decided as it was stipulated or conceded by the government. Collateral estoppel, in contrast to res judicata, applies only to issues that were directly litigated and not to those which merely could have been litigated. *Lovell*, 719 F.2d at 1376. A fact established in prior litigation not by judicial resolution but by stipulation has not been “actually litigated” and thus is the proper subject of proof in subsequent proceedings. *Otherson v. Department of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983). A contrary rule, commentators reason, would discourage parties from compromising and narrowing issues because of the possible future preclusive effect of their decisions. See *id.* at 274-75 (quoting *Restatement (Second) of Judgments* § 27 comment e, at 256 (1982)). The present case illustrates this concern, since it appears that litigation in the Rule 41(e) proceeding of the corporate versus personal status of Young’s bail bonding business would have resulted only in a technical change in the way Young identified himself in his motion. Cf. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4443, at 381-82 (1981) (issue not precluded by admission of facts in prior litigation through failure to deny opposing pleading “both because there has been no actual litigation or decision and because pleading maneuvers in one suit should not carry such consequences in other suits”).

Young cannot avoid this rule regarding issues not controverted by invoking language that collateral estoppel applies even though little or no evidence is introduced on an issue framed by the pleadings.¹ See *id.* § 4420, at 178-81. The rules apply in factually distinct settings depending on whether or not the parties in the prior proceeding actually disputed the relevant points, and Young has not met his burden of proving that the court in the Rule 41(e) proceeding rendered its verdict upon a determination that Young's bail bonding business was a personal business. See *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *Oldham v. Pritchett*, 599 F.2d 274, 277 (8th Cir. 1979). We agree that the government was not barred by the doctrine of collateral estoppel from proving that the bail bonding income should have been reported on Young's corporate tax return.

Young next asserts that the income from the bail bonding business was included in his corporate return as net income, although not as gross income and that his corporate return thus was not "untruthful" within the contemplation of section 7206(1) but merely "incomplete." In a section 7206(1) prosecution, however, the government need not establish an actual tax deficiency. See *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976). A tax return that "omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206." *Id.* at 403 (quoting *Siravo v. United States*, 377 F.2d 469, 472 (1st Cir. 1967)); see also *United States v. Greenberg*, 735 F.2d

¹ Our reasoning here also disposes of Young's argument that the government admitted the personal status of the bail operation when it referred in its petition for rehearing en banc to the "unincorporated bail bonding business." The government again was merely restating background information not in contention. Cf. *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (discussing limitations on the use as admissions of statements made at opening argument in prior proceedings).

29, 31 (2nd Cir. 1984) (function of section 7206(1) is in part to ensure that taxpayers not make statements that would hinder the government in verifying the accuracy of returns); *cf. United States v. Grabinski*, 727 F.2d 681, 686 (8th Cir. 1984) (validity of tax return under section 7203 depends on whether it gives the IRS sufficient information from which to calculate tax liability based on taxpayer's circumstances, including gross income). The district court did not err in instructing the jury that Young's alleged false statements pertaining to gross receipts, if proven beyond a reasonable doubt, were material as a matter of law and could be the basis for a section 7206(1) conviction.

Young contends that the district court erred in excluding testimony pertaining to the overall loss realized from the bail bonding business. Young called Mark Larson, a certified public accountant, as an expert witness to testify about exhibits he had compiled that allegedly showed that the total deposits to Corporation's bonding account were approximately the same amount that the government claimed was omitted from the 1980 corporate income tax return. The district court sustained the government's objection on the ground of lack of foundation.

The government argues that the district court properly excluded Larson's testimony on the ground of lack of foundation for the following reasons: (1) the offered calculation was not based on the fiscal tax year; (2) the bonding account was treated as a trust account with deposits treated as liabilities, rather than as income; (3) no income and expense analysis of the bonding account was made during the preparation of the corporate income tax return; (4) not all of the receipts from the bail bonding business were deposited into the bonding account; and (5) most of the withdrawals from the bonding account were simply "pass through" items, rather than expenses.

In *Hannah v. City of Overland*, 795 F.2d 1385, 1388-89 (8th Cir. 1986), the court held:

An appellant bears a heavy burden under the appellate standard of review of a district court's evidentiary rulings. Whether to admit or exclude testimony is committed to the sound discretion of the district court. This Court will reverse a district court's decision to exclude evidence only if the district court has abused its discretion. *United States v. Curnew*, 788 F.2d 1335, 1338 (8th Cir. 1986); *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 133 (8th Cir. 1985) ("Questions of relevancy are committed to the broad discretion of the trial court").

This standard of review applies to rulings on the admission of expert as well as lay testimony. *Smalley v. United States*, No. 85-2221, (8th Cir. Aug. 20, 1986); *United States v. Curnew*, 788 F.2d 1335, 1338 (8th Cir. 1986); *United States v. Tovar*, 687 F.2d 1210, 1215 (8th Cir. 1982).

When measured against this standard, the district court's refusal to admit the proffered testimony did not constitute reversible error. We note that this lengthy trial involved the admission of much documentary evidence, the relevance of which is not always immediately apparent from the cold pages of the record. We are satisfied that the trial court, permitting as it did extended argument by counsel on the admissibility of Larson's proposed testimony, was in a much better position than are we to rule on the question.

We have carefully considered all additional points raised by Young, and we find no reversible error.

The judgment of conviction is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 85-5211-ND

**United States of America,
Appellee,**

vs.

**Robert E. Young,
Appellant.**

**Appeal from the United States
District Court for the
District of North Dakota**

**Appellant's petition for rehearing en banc has been
considered by the Court and is denied.**

Petition for rehearing by the panel is also denied.

January 5, 1987

